

ADMINISTRATIVE LAW: *Judicial review – Refusal of – Breach of listing requirements – Listing committee imposed sanctions for directors to be publicly reprimanded and fined – Directors’ appeal to Appeals Committee dismissed – Directors sought judicial review against decision – Applications for judicial review dismissed by courts – Bursa Malaysia applied for penalties imposed upon directors to be enforced – Res judicata – Whether applicable – Whether court entitled to grant orders prayed for – Capital Markets and Services Act 2007, s. 360*

The respondent, the stock exchange that operates the Bursa Malaysia stock market ('the Exchange'), had applied for, *inter alia*, penalties that it had imposed upon the appellants ('defendants') pursuant to its main market listing requirements ('listing requirements') to be enforced as though they were judgments of the court. The defendants were both directors of Patimas Computers Berhad ('Patimas') which was listed in the main market of the Exchange. The Exchange was of the view that the defendants had breached the listing requirements by, *inter alia*, not announcing the audited financial statements and failing to issue the annual report within the time stipulated. The Listing Committee of the Exchange found that the defendants had been in breach of the applicable provisions of the listing requirements and imposed the following sanctions that the defendants be publicly reprimanded and fined. The defendants appealed to the Appeals Committee of the Exchange against the decision of the Listing Committee. Their appeal was, however, dismissed. Dissatisfied, the defendants sought judicial review of this decision. Their applications were dismissed by the High Court and the Court of Appeal. Leave to appeal to the Federal Court was also refused. Shortly after the judicial review actions were commenced, the Exchange filed an originating summons at the Sessions Court, which was the subject of the

present appeal. The Exchange's action was premised upon s. 360(1)(c), (J) and (K) of the Capital Markets and Services Act 2007. The Exchange prayed for, among others, an order directing the payment of the fines imposed upon the defendants within 14 days of the date of the order, failing which a judgment in the corresponding sums would be entered against them. The Sessions Court granted the prayers sought in the originating summons. Thus, the defendants appealed.

Held (dismissing appeal):

- (1) The rules that the Exchange administers include, *inter alia*, rules that govern the terms of admission into the official list of the Exchange. Admission into the official list allows the shares in a listed company to be publicly traded on the stock market operated by the Exchange. Listed companies must not only fulfil certain criteria to become listed, but they must also continue to fulfil these and other criteria to remain listed. This body of rules is known as the listing requirements. Among the main pillars of regulation in the listing requirements is the continuous disclosure obligation imposed upon listed companies. The breaches that the defendants had committed were related to certain continuous disclosure obligations. (paras 18-20)
- (2) A director who agrees to be appointed to a board of listed issuer effectively undertakes to comply with the terms of the listing requirements. The rules of a Stock Exchange and a Derivatives Exchange are subject to statutory control and imbued with statutory consequences. By law, amendments to the rules of a Stock Exchange or Derivatives may only take effect after they have been approved by the Securities Commission. In addition, power is conferred upon the commission and exchanges to statutorily enforce the provisions of the rules of exchanges. This is reflective of the fact that an Exchange, even though it is principally a commercial venture, is also a public interest organisation. There is statutory control over the functions of an Exchange. The duties of an Exchange are expressly provided for in s. 11 of the Capital Markets and Services Act 2007. It was, therefore, undeniable that the Exchange bore a statutory duty not only to ensure that the markets it operated were fair and orderly but also to enforce its own rules, which include the listing requirements. (paras 23-28)
- (3) The rules of the Exchange are, at their core, contractual arrangements between the Exchange and the regulated persons. Thus, if a person contravened the rules and had a sanction imposed against him or her but still refused to comply with the terms of the sanctions, the Exchange can exclude the person from further participation in the markets of the Exchange. Section 360 extends the powers of the Exchange and permits it to apply for a court order to give effect to its rules. (para 35)

A (4) In an application under s. 360, it suffices for the Exchange to establish
that (a) the Exchange had found there to have been a contravention of
its rules; and (b) the appeals process provided under the rules of the
B Exchange had been exhausted, or no appeal had been made against the
determination of the Exchange within the period in which an appeal has
to be made. Once the Exchange had done so, the court would be entitled
to grant the orders prayed for. If the person against whom sanction had
been imposed had commenced judicial review to challenge the
imposition of a sanction, the court hearing the s. 360 application would
be entitled to stay the action until the judicial review action had been
C disposed of. If, as in the present case, judicial review had been refused
and the appeals against this determination had been exhausted, the court
would be entitled to grant the orders prayed for. (paras 37-40)

(5) All the reasons that the defendants cited as their grounds for appeal were
also grounds that they had relied upon to mount their judicial review
D challenge. Having raised these grounds in the judicial review challenge
and with judicial review having been refused, the defendants would be
precluded by the principle of *estoppel per rem judicatam* from raising the
same issues to resist the s. 360 application. There was also no reason to
interfere with the exercise of discretion by the Sessions Judge in
E determining the costs of the originating summons. The Sessions Judge
was perfectly entitled to have come to a finding based on affidavit
evidence that there had been a contravention of the listing requirements
and that the decision of the Appeals Committee of the Exchange had not
been complied with by the defendants. (paras 41-44)

F **Case(s) referred to:**

Bursa Malaysia Securities Bhd v. Gan Boon Aun [2009] 5 CLJ 698 CA (*refd*)
Petroliam Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew [1986] 1 LNS 81 SC
(*refd*)

*Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd & Other
Appeals* [2012] 3 CLJ 837 CA (*refd*)

G *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd
& Another Appeal* [2012] 8 CLJ 678 CA (*refd*)

Legislation referred to:

Capital Markets and Services Act 2007, ss. 2(1), 11, 360(1)(c), (J), (K)

Contracts Act 1950, s. 75

H Rules of Court 2012, O. 59 r. 22

For the appellants - Jasbeer Singh & Nur Hakimah Mohamad; M/s Jasbeer Nur & Lee
For the respondent - Kwan Will Sen & Joyce Lim Hwee Yin; M/s Skrine & Co

[Editor's note: Appeal from Sessions Court, Kuala Lumpur; Civil Suit No: B54-53-12-2015]

I *Reported by Suhainah Wahiduddin*

JUDGMENT

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Azizul Azmi Adnan J:

[1] This was an appeal against orders granted by the Sessions Court pursuant to s. 360 of the Capital Markets and Services Act 2007. The plaintiff respondent, which is the stock exchange that operates the Bursa Malaysia stock market, had applied for, *inter alia*, penalties that it had imposed upon the defendant appellants pursuant to its Main Market Listing Requirements to be enforced as though they were judgments of court. The Sessions Court granted the orders prayed for. The appellants appealed.

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[2] I dismissed the appeal, for the reasons that I explain in this judgment. The appellants are referred to here as they were in the court below, while the respondent is referred to as the “Exchange”.

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Background

[3] The defendants were both directors of Patimas Computers Berhad (“Patimas”). Patimas was listed in the Main Market of the Exchange, but has since been delisted. The first defendant, Madam Law Siew Ngoh, was the managing director of Patimas at the material time, while second defendant Dato’ Ng Back Heang, was an executive director.

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[4] The Exchange was of the view that the defendants had breached the listing requirements. Specifically, it was charged that the defendants had failed:

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- (a) to announce the audited financial statements of Patimas for the period ending 31 March 2012 within the time stipulated in the listing requirements;
- (b) to announce the quarterly financial report of Patimas for the first quarter of 2013 within the time stipulated in the Listing Requirements;
- (c) to issue the annual report of Patimas for the period ending 31 March 2012 within the time stipulated in the listing requirements; and
- (d) to ensure the accuracy of an announcement on the unaudited quarterly report for the last quarter of 2012, which had understated the losses of Patimas by some RM64 million.

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[5] A notice was issued to the defendants, informing them that the Listing Committee of the Exchange would hear and deliberate on the contended breaches of the Listing Requirements. Following written representations to the Listing Committee, the Listing Committee found that the defendants had been in breach of the applicable provisions of the listing requirements and imposed the following sanctions:

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- (a) Madam Law was publicly reprimanded and fined RM816,500; and
- (b) Dato’ Ng was also publicly reprimanded and fined RM176,600.

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A [6] The defendants appealed to the Appeals Committee of the Exchange against the decision of the Listing Committee. Their appeal was however dismissed by the Appeals Committee.

B [7] Dissatisfied with the decision of the Appeals Committee, the defendants sought judicial review of this decision. Their applications were dismissed by the High Court. They appealed. Their appeal was dismissed by the Court of Appeal. Leave to appeal to the Federal Court was also refused. The denial of leave was not a fact that was in evidence in the court below. However, parties agreed for the appeal before me to proceed on the basis that this was an agreed fact, thereby dispensing with any need for an application for fresh evidence to be adduced.

C [8] Shortly after the judicial review actions were commenced, the Exchange filed an originating summons at the Sessions Court. This originating summons is the subject of the present appeal.

D [9] The Exchange's action is premised upon ss. 360(1)(c), (J) and (K) of the Capital Markets and Services Act 2007. Briefly stated, these provisions give the right to the Exchange to apply to court for a court order directing a person who has contravened its rules to comply with the requirements of such rules. In the present case, the Exchange had prayed (among others) for an order directing the payment of the fines imposed upon the defendants within 14 days of the date of the order, failing which a judgment in the corresponding sums would be entered against them.

E [10] The Sessions Court granted the prayers sought for in the originating summons. The defendants appealed against this decision.

F **The Grounds Of Appeal**

[11] The defendants' notice of appeal stated that they were appealing against the whole of the decision of the learned Sessions Judge.

G [12] The written submissions of learned counsel for the defendants set out the specific grounds of appeal. They may be summarised as follows:

- (a) the defendants were not responsible for the delays, purported deviations and adjustments as listed in the alleged breaches;
- (b) the officers of the Exchange had been involved in advising the audit committee of Patimas to suspend the defendants, which denied them the ability to adequately defend themselves;
- (c) the special audit report prepared by BDO Governance Advisory Sdn Bhd ("BDO") and the investigative audit report prepared by UHY Advisory (KL) Sdn Bhd ("UHY") were not complete and ought not have been relied upon by the Listing Committee and the Appeals Committee of the Exchange;

(d) certain software development agreements that UHY had stated in their report as being non-existent had in fact been found by a representative of the Securities Commission; and

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(e) amount of the fines imposed by the Exchange were excessive, unfair, unreasonable and not commensurate with the alleged breaches.

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[13] It was also contended that the costs of the application of RM12,000 awarded by the Sessions Court was excessive.

Analysis And Decision

Summary Of The Decision Of This Court

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[14] In my judgment, it was not competent for the defendants to raise the grounds of appeal (summarised at para. 12 *ante*) in this current action by reason of the proper application of the doctrine of estoppel *per rem judicatam*.

[15] In addition, I saw no reason to interfere with the exercise of discretion by the learned Sessions Judge in determining the costs of the originating summons. Where a matter was determined pursuant to the exercise of a discretion by a lower court, an appellate court would lean against interfering with the decision unless it can be shown that the judge had exercised his discretion based on the wrong principles of law.

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[16] The analyses underlying these determinations are explained in the following paragraphs.

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The Nature Of The Listing Requirements

[17] The Exchange is the operating company that operates and maintains the Bursa Malaysia stock market. It is the successor entity to the Kuala Lumpur Stock Exchange, a company limited by guarantee, which like most Exchanges around began as a corporation that were owned by its members—the stock broking companies. Following demutualisation, the Exchange became a wholly-owned subsidiary of the Bursa Malaysia Berhad, which also holds the various other operating entities that provide financial markets infrastructure services in Malaysia, such as Bursa Malaysia Derivatives Berhad, which operates the exchange-traded derivatives market, and Bursa Depositories Berhad, which provides depository services for stock exchange. Bursa Malaysia Berhad is itself listed.

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[18] The rules that the Exchange administers may be divided into two broad categories: first are the rules relating to trading and settlement of dealings in securities. These govern matters such as the admission criteria for stock brokers (now known as “participating organisations”), the manner in which trades are entered into in the automated trading system of the Exchange, how such trades are settled and the electronic book-entry transfer of title to securities.

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A [19] The second category-and this is the category with which we are concerned in this case-are the rules that govern the terms of admission into the official list of the Exchange. Admission into the official list allows the shares in a listed company to be publicly traded on the stock market operated by the Exchange. Listed companies must not only fulfil certain criteria to become listed, but they must also continue to fulfil these and other criteria to remain listed. This body of rules is known as the listing requirements, and there are different requirements applicable to the different “boards”, which generally reflect the different risk profiles of the listed companies. Among the main pillars of regulation in the listing requirements is the continuous disclosure obligation imposed upon listed companies.

C [20] The breaches that the defendants have been found to have committed relate to certain continuous disclosure obligations.

D [21] The rules of the Exchange have their genesis in contract. A participating organisation, for example, agrees to be bound by the terms of the Bursa Malaysia Securities Rules, referred to colloquially as the “business rules”. Similarly, a listed company that is admitted into the official list of the Exchanges agrees to comply with the obligations contained in the listing requirements.

E [22] The obligation to comply with the listing requirements extends to, among others, the directors, officers and advisers of listed issuers. This is provided for in para. 2.04(2) of the listing requirements, which provides:

(2) A listed issuer, a management company, a trustee, a trustee-manager, its directors, officers, advisers or any other person to whom these Requirements are directed must:

- F (a) comply with these Requirements for so long as the listed issuer or its securities remain listed on the Official List. This applies even during periods when the listed issuer’s securities are suspended from trading; and
- G (b) comply and give effect to any decision made, conditions imposed, and instruction or directive issued, by the Exchange, within the time stipulated by the Exchange

H [23] Thus, a director who agrees to be appointed to a board of listed issuer effectively undertakes to comply with the terms of the listing requirements. A written undertaking is provided to the Exchange for this purpose.

I [24] This contract, however, is of a peculiar nature. In much the same way that the memorandum and articles of association of a company form a statutory contract between the members of a company *inter se*, the rules of a stock Exchange and a derivatives Exchange are subject to statutory control and imbued with statutory consequences. (Indeed, prior to demutualisation, the business rules of KLSE took effect as part of its memorandum and articles

of association, which is why the reference to the memorandum and articles is retained in the definition of “rules” in s. 2(1) of the Capital Markets and Services Act 2007.)

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[25] Thus, by law, amendments to the rules of a stock Exchange or derivatives may only take effect after they have been approved by the Securities Commission. In addition, power is conferred upon the Commission and Exchanges to statutorily enforce the provisions of the rules of Exchanges.

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[26] This is reflective of the fact that an Exchange, even though it is principally a commercial venture, is also a public-interest organisation. It plays a vital role in capital formation in the economy. The integrity of the markets it operates is paramount not only in maintaining investor confidence but also to ensure that systemic risks are minimised and contained, to prevent knock-on effects into the other parts of the economy, such as the banking system.

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[27] For this reason, there is statutory control over the functions of an Exchange. The duties of an Exchange are expressly provided for in s. 11 of the Capital Markets and Services Act 2007:

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(2) It shall be the duty of an Exchange to ensure, so far as may be reasonably practicable, an orderly and fair market in the securities or derivatives that are traded through its facilities.

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(3) In performing its duty under subsection (2), the Exchange shall:

(a) act in the public interest having particular regard to the need for the protection of investors; and

(b) ensure that where any interests that it is required to serve under any law relating to corporations conflict with the interest referred to in paragraph (a), the latter shall prevail.

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(4) It shall be the duty of the Exchange to take appropriate action as may be provided for under its rules for the purpose of monitoring or securing compliance with such rules.

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[28] It is therefore undeniable that the Exchange bears a statutory duty not only to ensure that, as far as reasonably practicable, the markets it operates fair and orderly but also to enforce its own rules, which include the listing requirements.

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[29] In *Tan Sri Dato’ Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd & Other Appeals*¹, the Court of Appeal went so far to hold that the listing requirements have statutory force, and hence applied to bind directors notwithstanding the general company law which rendered the office of a director *functus officio* once a provisional liquidator was appointed over the company.

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A *Breach Of The Listing Requirements*

[30] Where a regulated person has had enforcement action taken against him or her under rules of an Exchange, any challenge against this enforcement action has first be taken up through the prescribed appeal process. In the present case, the defendants appealed against the decision of the Listing Committee to the Appeals Committee. There is no further right of appeal.

[31] If the regulated person is still dissatisfied with the dismissal of his appeal, he may do one of two things: if the rights of the person that is claimed to have been infringed is a private law right, then the appropriate course would be to commence a writ action. Where however the rights that are purported to have been infringed are public law rights, then the proper course would be apply for judicial review.

[32] In the case of *Bursa Malaysia Securities Bhd v. Gan Boon Aun*², the Court of Appeal accepted the proposition that the deliberations of the Exchange would be amenable to review (see para. 37 of the decision) on account of the public duties that it performs.

Section 360 Of The Capital Markets And Services Act 2007

[33] Section 360 of the Capital Markets and Services Act 2007 provides, among others, for the power of the Exchange to enforce its rules *via* the courts. This section, in so far as it is material for the present purposes, provides as follows:

(1) Where:

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(c) on an application by an Exchange holding company, a stock Exchange, a derivatives Exchange or an approved clearing house, as the case may be, it appears to the court that:

(i) any person has contravened a relevant requirement; or
(ii) any person has contravened a relevant requirement and that there are steps which could be taken for remedying the contravention or mitigating the effect of such contravention; or

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the court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this section, make one or more of the following orders:

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(J) where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do any act or thing that he is required to do under a relevant requirement, an order requiring such person to do such act or thing;

(K) in a case of a contravention by a person of the rules of a stock exchange, a derivatives exchange or an approved clearing house, an order giving directions concerning compliance with or enforcement of those rules to:

(i) the person; and

(ii) if the person is a body corporate, the directors of the body corporate;

[34] The expression “relevant requirement” is defined to include the rules of a stock exchange would therefore include the listing requirements.

[35] As mentioned earlier, the rules of the Exchange are, at their core, contractual arrangements between the Exchange and the regulated persons. Thus if a person contravenes the rules and has a sanction imposed against him or her but still refuses to comply with the terms of the sanctions, the Exchange can exclude the person from further participation in the markets of the Exchange. Section 360 extends the powers of the Exchange and permits it to apply for a court order to give effect to its rules.

[36] Of course, in the absence of a provision like s. 360, if an Exchange seeks to enforce a penalty against a regulated person through the courts, it may be faced with difficulties: for example, it may have to prove its case in court all over again. It may also be argued that the penalties are enforceable only to the extent that they are reasonable by reason of s. 75 of the Contracts Act 1950.

[37] Section 360 addresses these difficulties. In *Tengku Dato’ Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal*⁵, the Court of Appeal held that the words “it appears to the court” as used in s. 360(1)(c) connotes a lower standard than having to “prove” contravention of a rule of the Exchange.

[38] In my judgment, in an application under s. 360, it suffices for the Exchange to establish that:

(a) the Exchange has found there to have been a contravention of its rules; and

(b) the appeals process provided under the rules of the Exchange has been exhausted, or no appeal has been made against the determination of the Exchange within the period in which an appeal has to be made.

[39] Once the Exchange has done so, the court would be entitled to grant the orders prayed for. If the person against whom sanction has been imposed has commenced judicial review to challenge the imposition of a sanction, the court hearing the s. 360 application would be entitled to stay the action until the judicial review action has been disposed of. Whether it should do so would be dependent on the proper exercise of judicial discretion based on the facts of the case.

A [40] If, as in the present case, judicial review has been refused and the appeals against this determination have been exhausted, the court would be entitled to grant the orders prayed for.

B [41] In my judgment, the learned Sessions Judge was perfectly entitled to have come to a finding based on affidavit evidence that there has been a contravention of the listing requirements and that the decision of the Appeals Committee of the Exchange had not been complied with by the defendants. For this reason alone, the appeal should be dismissed.

Res Judicata

C [42] The appeal should also be dismissed for a second reason. All the reasons that the defendants cite as their grounds for appeal were also all grounds that they had relied upon to mount their judicial review challenge. Having raised these grounds in the judicial review challenge and with judicial review having been refused, the defendants would be precluded by the principle of estoppel *per rem judicatam* from raising the same issues to resist the s. 360 application.

D [43] Since the date of the hearing before the Sessions Court, the Court of Appeal has dismissed the defendants' appeal, and leave to appeal to the Federal Court has been refused. Accordingly, the matters raised as grounds for appeal in this case have all been finally determined by the courts. It was not competent for the defendants to re-litigate or re-canvass the issues before me.

Appeal Against Costs

F [44] I saw no reason to interfere with the exercise of discretion by the learned Sessions Judge in determining the costs of the originating summons. Where a matter was determined pursuant to the exercise of a discretion by a lower court, an appellate court would lean against interfering with the decision unless it can be shown that the judge had exercised his discretion based on the wrong principles of law. No authority need be cited for such a trite proposition, but if one is needed, the Supreme Court in *Petroliam Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew*^A held as follows:

G To summarise, an appellate court does not interfere in the question of costs without reluctance. This is because the court below has an absolute discretion except that the discretion must be exercised judicially. An appellate court should not interfere unless it can be shown that there has been an error of law or the purported exercise of discretion was based on grounds wholly unconnected with the cause of action.

H [45] It was contended by counsel for the defendants that the scale costs prescribed pursuant to O. 59 r. 22 of the Rules of Court 2012 should apply, which provides for a maximum of RM10,000 as costs. In my judgment, the

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present action before the learned Sessions Judge was not one that came within any of the limbs of O. 59 r. 22, and hence this submission was entirely misconceived.

[46] The appeal on costs was thus also dismissed.

Endnote:

1. *Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd & Other Appeals* [2012] 3 CLJ 837
2. *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698
3. *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal* [2012] 8 CLJ 678
4. *Petroliam Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew* [1986] 1 LNS 81; [1987] 1 MLJ 25

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